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### Technical Bulletins: F.L.S.A.: Minimizing the Effect of Compulsory Overtime Pay

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## technical bulletin

Municipal Technical Advisory Service  
Institute for Public Service, The University of Tennessee  
In cooperation with the Tennessee Municipal League

February 5, 1975

### F.L.S.A.: MINIMIZING THE EFFECT OF COMPULSORY OVERTIME PAY

NOTE: A stay order, upheld by the full U.S. Supreme Court, is in effect enjoining the Department of Labor from enforcing the provisions of the Fair Labor Standards Act Amendments of 1974 which apply to state and local governments.

However, counsel for the National League of Cities advises that cities could be potentially held liable for back minimum wages and overtime compensation for those employees covered as of May 1, 1974, should the Court uphold the constitutionality of the amendments. NLC is advising cities to monitor these obligations and to hold in escrow any pay due such employees (i.e., minimum wages at the \$1.90 rate for all employees and overtime compensation for all employees other than police and fire personnel).

The NLC counsel also advises that, in his opinion, cities will not be liable for those provisions which were to have gone into effect on Jan. 1 of this year (the \$2.00 minimum wage for all employees, including policemen and firemen, and overtime compensation for policemen and firemen).

For this reason, MTAS feels the article below will be of assistance to Tennessee cities.

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THE FEDERAL MINIMUM WAGE LAW, while primarily designed to protect the employee, also recognizes certain rights of employers. A misunderstanding of the employer's rights under the law could result in employers paying far more in wages than might be necessary.

While the minimum wage law provides for a minimum wage and mandatory overtime, it does not guarantee a fixed number of hours of work per week. Neither does the law guarantee payment to the employee of a fixed amount each payday. How many hours a person may work, when he may work and the time he gets paid are matters to be decided by the employers.

From time to time all employers must ask employees to work overtime. Sewers clog, water mains break, snow must be removed - there are any number of reasons. Usually an employer tries to schedule his work so that overtime is not necessary. Sometimes it cannot be avoided.

Under the minimum wage law the employer must pay for overtime. He must pay in cash, not compensatory time off. The fact the overtime resulted from an emergency is immaterial. The fact the employee would just as soon have the time off at some future date also is immaterial. The employee worked. The law says he must be paid.

FEB 4 1975

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One very important thing is to be sure we understand just what overtime is. Under the wage-hour law there is no overtime until a person has worked 40 hours in a work week. The employee may be required to work on a day he normally has off or he may be required to work hours he normally does not work. Just because he worked these days or hours does not automatically mean the time worked is overtime. Work doesn't become overtime until after the employee has worked 40 hours in a work week.

There are steps which an employer can take to help minimize the effect of being forced to pay overtime; one of the most important is in fixing the work week. Each employer must have a work week. The work week can begin on any day of the week and on any hour of the day. The work week determines whether or not an employee is entitled to overtime pay.

Some municipalities are beginning their work week on Friday rather than the conventional Monday. When a work week begins on Monday, the employee has completed his 40 hours of work by Friday. Suppose this employee must be called out on an emergency sometime between 5:00 p.m. Friday and 8:00 a.m. Monday. This will be overtime work and will cost the employer one and one-half times the employee's regular hourly wage.

But suppose the work week begins at 5:00 p.m. on Friday. If the employee is called out to work between 5:00 p.m. Friday and 8:00 a.m. Monday, he has worked no overtime. Let's say the employee worked two hours on Sunday. Anytime between 8:00 a.m. Monday and 5:00 p.m. Friday, the end of the work week, the employer could let this employee go home two hours early. Thus, the employee would work only 40 hours that week and thus would receive no overtime pay.

You might say this is granting the employee compensatory time off which is not permitted under the law. Wrong. This isn't compensatory time at all. What we have done is merely rearranged the employee's work schedule for the week so that he has worked only 40 hours.

What happens if you can't let the employee have those two hours off? You pay him for two hours of overtime. There is no way to avoid it. But all isn't lost. There is a way legally to get that amount of overtime pay back.

Take the example above. You had to pay the employee two hours overtime. The next week the work load might be lighter. So one day you send the employee home three hours early. Why three hours? That is equivalent to the overtime you paid for the two hours work. Since the employee will work only 37 hours this week, instead of 40 hours, you pay the employee for only 37 hours. Does the employee get gypped? No. For the first week the employee worked 42 hours but received the equivalent of 43 hours pay at straight time. The second week he worked 37 hours. For the two weeks the employee gets paid for 80 hours of work. This is exactly the same amount which he would have received had he not worked those two hours of "overtime."

Under this method the employee really had not lost any wages and the employer has not been required to pay out any more than he normally would have paid. The net effect of this approach is no different than if you had permitted the employee to take compensatory time off for the overtime worked. If the employee had taken compensatory time, he would have received straight time pay for working 80 hours.

In many municipalities employees in the past normally have been scheduled to work more than 40 hours per week, particularly in utility plants. Here the problem is a little different. Some operations must be maintained around the clock. In the past schedules have been worked out which were convenient for the employee because it might give him extra time off in exchange for a longer work week. Since this really didn't cost the employer any more money, there was no problem.



Now, however, such schedules are going to cost more. If the overtime is substantial the cost also will be substantial. If the municipalities continue these schedules, they must be prepared to pay for the overtime worked.

It might, however, be possible to avoid overtime or to minimize the amount of overtime merely by rearranging the working schedules. While the employee may not be too happy with the change, it is perfectly lawful and a perfectly proper means of reducing the necessity to pay overtime or reducing the amount of overtime actually paid. At some point the employer must recognize that the cost of overtime might very well exceed the cost of hiring another employee on a full or part-time basis to permit shorter working hours.

Still another means of minimizing overtime payments is to exercise greater care in enforcing personnel policies. Employees should be paid for the hours they work. They should be paid for overtime when overtime actually is due. But employees should not be paid for time they have not worked except where the city has a policy of paying for sick leave, vacations or holidays. Permitting the employee to have a half-hour now and then without charging it to vacation or sick leave needlessly increases the employer's cost for wages. Avoiding such practices saves money.

Extension of the minimum wage and hour coverage to municipalities is forcing public employers to accept a number of changes they do not like. But employers must adjust whether they like it or not. It is not unreasonable to expect that employees, too, will have to make similar adjustments. (Reprinted from Kansas Government Journal, July 1974.)

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